Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Protecting the Privacy of Customers of Broadband and Other Telecommunications Services	)	WC Docket No. 16-106

Reply Comments of

Bret T. Swanson[1]

Consumer privacy is an important matter of public policy, evermore so in a digital world of exploding data. It thus deserves considered and thoughtful judgment by policymakers and regulatory bodies.

The rules adopted by the Federal Communications Commission in 2016, however, do not meet this test. The new rules duplicate some existing rules and contradict many others. Because they overlap but are inconsistent with existing rules, the new rules will create confusion for both consumers and service providers. In their grossly varied treatment of suppliers of digital services, the new rules discriminate against some firms, and in favor of others, in a way that could define the structure of the market for years to come. Perhaps most importantly, the new rules almost certainly exceed the Commission's legal authority – even after the Open Internet Order

[1] Bret Swanson is president of the technology research firm Entropy Economics LLC, a visiting fellow at the American Enterprise Institute, and a fellow at the U.S. Chamber of Commerce Foundation. The views expressed herein do not necessarily reflect the views of these organizations, which are listed for identification purposes only.

reclassified broadband as a Title II service. For these and other reasons, the Commission should grant the Petitions for Reconsideration and withdraw the 2016 rules.

The Federal Trade Commission has for years policed the digital privacy arena under its broad authority to protect consumers. After the Commission granted itself authority in the Open Internet Order (OIO) to regulate broadband as a common carrier service, it expanded the old, narrow law concerning telephone privacy (Section 222, governing customer proprietary network information, or CPNI) to cover the vast, new, and very different world of Internet data. But the Commission didn't apply the old telephone rules to the whole Internet; it applied them to just one sliver of the Internet and exempted far larger and more diverse portions of the Internet that in fact process more customer data. The Commission thus used a highly suspect rule (the OIO) to apply an old and ill-suited telephone-specific provision to the modern Internet, but in a way that doesn't actually cover most of the Internet.

Unlike the old telephone network, in which two talking parties and the phone company itself were the only ones privy to the fact and content of the call, the structure of the Internet means that many more entities provide, touch, and see customer data. Google, for example, processes 40 million searches per second, 3.5 billion per day, and 1.2 trillion per year. According to Statista, Google processes 63.9% of the U.S. searches and, according to eMarketer, enjoys up to 78% of search revenue. With Facebook, Google dominates the digital advertising market. By some estimates, the two companies are capturing up to 90% of all new digital ad dollars.

The new rules, however, exempt from their stringent requirements Google, Facebook, and other data-intensive firms. The new rules pretend that Internet service providers (ISPs) are like the old phone companies in their monopoly on customer information. This pretense does not

remotely resemble reality. In fact, because an increasing portion of customer data is encrypted – blinding ISPs from the content of Internet sessions – ISPs may in fact *see* far less data than many of the search, social media, content, software, device, and cloud companies. These companies often enjoy far more intimate, direct relationships with customers than do ISPs. Not only do the new rules exempt the firms with the most – and most relevant and valuable – data, they also discourage competition in the digital advertising market, which by many measures is increasingly concentrated. The rules would thus likely cement in place an already concentrated market.

The important differences between the old telephone network and the Internet also show why the new privacy rules are probably illegal. The Section 222 CPNI rules were written specifically for point-to-point telephony. But the Commission asserts it can simply apply them, with some tweaks, to the multifaceted, multi-node Internet. The Commission's attempt is too ambitious and exceeds the statute in important ways. Section 222 covers information about, for example, phone numbers called and the time of calls which "is made available to the carrier by the customer solely by virtue of the carrier-customer relationship." But ISPs and other firms have access to lots of information that is not "made available to the carrier by the customer solely by virtue of the carrier-customer relationship." The multi-sided nature of the Internet means that everyone has lots of information about everyone else beyond the "carrier-customer relationship." Yet the new rules attempt to regulate this data that is clearly outside the bounds of the statute.

American consumers and the digital economy deserve a better (and legal) privacy framework.